Supreme Court, U.S.
FILED

961781 APR 15 1997

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No. 97-

In the Supreme Court
of the United States

October Term, 1996

IRVING C. STEVENS AND JEANETTE STEVENS,

Petitioners,

v.

CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its Department of Parks and Recreation, Division of State Lands, Land Conservation and Development Commission, and Judicial Department,

Respondents.

Petition for a Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

In *State ex rel. Thornton v. Hay*[1] the Oregon Supreme Court held, *sua sponte,* that Oregon's beaches were burdened with a public recreational easement, based upon the English common law of ancient custom. The Stevens filed a Fifth Amendment Takings case in Oregon's state court arising from the State and City's denial of a seawall permit (*Stevens I*).[2] The dismissal of the state complaint, for failing to state a claim, was upheld by the Oregon Supreme Court's holding that *Lucas v. South Carolina Coastal Council,* 505 US 1003 (1992) —— with its requirement of an evidentiary "antecedent inquiry" as to the existence of customary easements in Oregon's common law when

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[1] *State ex rel. Thornton v. Hay,* 254 Or 584, 462 P2d 671 (1969).

[2] *Stevens v. Cannon Beach,* 114 Or App 457, 835 P2d 940 (1992) App., *infra,* H.96-99; *affirmed* 317 Or 131, 854 P2d 449 (1993) App., *infra,* I.110-118, *cert. denied* 510 US 1207 (1994) App., *infra,* J. 119-126.

petitioners took title — was not applicable, because the *Thornton* case merely enunciated a background principle of Oregon's property law. The Stevens filed a denial of procedural due process complaint in the Federal court (*Stevens II*).[3] The Federal complaint was dismissed on the grounds that said procedural due process complaint was barred by the State's rule of claim preclusion. These cases, read in light of the *Lucas* case, raise the following questions:

1. Whether the *Lucas* Court's "antecedent inquiry" may be avoided by a state court, (which imposes a public use easement, based upon custom, on, theretofore private property), by that court's mere statement, unsupported by a trial court record, that the easement is a pre-existent background principle of the state's common law of nuisance and property and, therefore, *Lucas* does not apply.

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[3] *Stevens v. City of Cannon Beach, et al.*, 893 F.Supp. 944 (D.Or. 1995) App., *infra*, B.3, C.5, *affirmed*, unpublished opinion (C. A. 9, 1997), App., *infra*, A.1.

2. Whether federal courts, in § 1983 civil rights suits claiming state deprivation of procedural due process, are required to give full faith and credit, and thereby claim preclusive effect, to a state court's decision which holds (for the first time and without any evidentiary hearing thereon) that the state's common law of property had always imposed an exclusive public use easement, based on ancient custom, over a certain classification of, theretofore, private property even though acquired twelve years before the state court decision?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties to the proceeding in the Ninth Court of Appeals for the Ninth Circuit.

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IRVING C. STEVENS AND JEANETTE STEVENS,

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CITY OF CANNON BEACH and STATE OF OREGON, acting by and through its Department of Parks and Recreation, Division of State Lands, Land Conservation and Development Commission, and Judicial Department,

Respondents.

On Writ of Certiorari To the
United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners Irving C. and Jeanette Stevens respectfully pray that a writ of certiorari issue to review the January 17, 1997 unpublished Opinion and Final Order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The January 17, 1997 Opinion and Order of the United States Court of Appeals for the Ninth Circuit (App., *infra,* A-1) is unreported. The Opinion (App., *infra,* C.5-23) and Judgment (App., *infra,* B.3-4) of the United States District Court for the District of Oregon is reported at 893 F.Supp. 944 (D.Or. 1995).

STATEMENT OF JURISDICTION

Petitioners seek review from the Opinion and Order of the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals entered its judgment on January 17, 1997 (App., *infra, A.*1).

The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution, in pertinent part, states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Jurisdiction and the Federal Questions Presented Below

Jurisdiction in the United States District Court, for the District of Oregon, was based upon 28 USC § 2201, 42

USC § 1983 and 1988 as well as 28 USC § 1331.

Jurisdiction in the United States Court of Appeals for the Ninth Circuit was based upon 28 USC § 1291.

The argument that claim preclusion did not bar the Steven's procedural due process claim, was raised in the District Court in plaintiff's Brief in Opposition to Motion to Dismiss, R 17 at pp. 6-8, App., *infra,* D.27-30 and in the United States Court of Appeals for the Ninth Circuit in the Stevens Opening Brief App. Rec. 10 at pp. 15-20, App., *infra,* E.42-52, and during oral argument, App. G.76-78, 91-92.

Arguments on misapplication of claim preclusion appear in the Stevens Opening Brief to the Court of Appeals App. Rec. 10 at pp. 26-27, App., *infra,* E.59-60 and in petitioner's Reply Brief App. Rec. 14 at pp. 5-7, App., *infra,* F.63-66 and during oral argument App. G at pp. 76-88, 91-92.

2. The Nature of petitioners procedural due process complaint below

In the case below *Stevens v. City of Cannon Beach,* 893 F.Supp. 944 (D.Or. 1996) App. B.3 *affirmed,* unpublished Opinion and Order, (January 17, 1997) App. A.1-2, (herein after *Stevens II*), the Stevens filed their Complaint in the United States District Court for the District of Oregon, alleging a denial of procedural due process, a denial of substantive due process and a denial of equal protection of law, alleged to have arisen by the Oregon courts' dismissal, on the pleadings, of the Stevens earlier state court Fifth Amendment "facial" and "as applied" takings complaint: *Stevens v. Cannon Beach,* 114 Or App 457, 835 P2d 853 (1993) App, *infra* H.96, *affirmed* 317 Or 131, 854 P2d 449 (1993) App., *infra,* I.100, *cert. denied* 510 US 1207 (1994) App. J.119 (hereinafter *Stevens I*). The District Court of Oregon dismissed the procedural due process complaint under FRCP 12(b)(6) for failing to state a

claim; based upon the argument that the State's rule of claim preclusion barred relitigation of the claim for denial of procedural due process, allegedly already heard and decided in *Stevens I*.

3. The Stevens State Takings Case: *Stevens I*

In 1989 the *Stevens* and the neighboring motel owner (Martin) applied to the City of Cannon Beach and appropriate State agencies for a permit to replace the Martin's deteriorating seawall and extend it 105 feet north across dry-sand beach property the *Stevens* had acquired in 1957 with the intent of enclosing a portion of the dry-sand by a seawall for motel development, consistent with the City's zoning of that land. The permits were denied by each agency, in part, upon their respective rulings that the case of *State ex rel. Thornton v. Hay,* 254 Or 584, 462 P2d 671 (1969) precluded any construction which impeded the public's recreational easement upon the dry-sand portion of

Oregon's beaches.[4]

The Stevens challenged the City and States' denial of their permit by filing an inverse condemnation case, (*Stevens I*), alleging that the denial of the permit constituted a "facial"

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[4] In the *Thornton* case, the State sought to enjoin Mr. and Mrs. Hay from reconstructing a fence previously built upon dry-sands of Cannon Beach which the previous winter storms had washed out. The State's original claim was for a prescriptive easement. The trial judge found this could not be proved (no exclusive public use), but found an easement over the 200' x 200' of dry sand area in front of the Hay seawall, under the doctrine of implied dedication, thus granting the injunction. (*See:* McLennan, *Public Patrimony: An Appraisal of Legislature and Common Law Protecting Recreational Values in Oregon's State-owned Lands and Waters,* 4 Env.L.Rev. 317, 356-559 (Spring 1974)). On appeal the Oregon Supreme Court *sua sponte* found a better, though never before used, doctrine of law upon which to grant a public easement, *i.e.*: the English law of ancient custom. The *Thornton* Court held that the public's recreational use of Oregon's dry-sand beaches satisfied the seven elements of the English common law of ancient custom. However, the new Thornton "customary easement" no longer rested upon a use of a specific parcel of land, but rested upon a type of soil, *i.e.* dry sand.

as well as an "applied" taking of their property. Motions to dismiss the complaint for failure to state a claim, based upon the *Thornton* case, were granted by the trial court.

During the pendency of the *Stevens I* appeal, *Lucas v. South Carolina Coastal Council,* 505 US 1003 (1992), was decided.[5] Therefore, the Stevens, argued to the Oregon appellate courts, in *Stevens I,* that the "antecedent inquiry," required of a court by *Lucas,* was missing in both the *Thornton* case and in the *Stevens I* case. Therefore, in order to avoid a future procedural due process claim, the Stevens argued, that the Oregon court should either, remand the case

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[5] *Lucas,* decision held, that in two circumstances a *per se* or "categorical taking" occurs, *i.e.:* where a rule or edict newly allows a physical invasion of property, including permanent but intermitant public use, or where a new rule or edict destroys all "economic value" of private property. In both circumstances, compensation must be paid, unless the governmental agency proves on the record, in an antecedent inquiry, that the same proscription, as made by the new statute, rule or edict, inhered in the owners property to begin with as a background principle of the state's law of nuisance and property.

for the "antecedent inquiry," or limit *Thornton's* stare decisis effect to a prospective application, and not a retrospective application to petitioners property (acquired twelve years before *Thornton).*

The Oregon Court of Appeals held that the *Lucas* case did not apply because *Thornton* had not declared new law in announcing a public recreational easement over Oregon's beaches. 835 P2d at 942 App., *infra,* H.96-98.

The Oregon Supreme Court also affirmed the dismissal of the takings complaint in *Stevens I,* holding that *Lucas* did not apply to *Stevens I* because *Thornton* had not "newly . . . decreed "custom as applying to Oregon beaches. To the contrary, the custom, according to the Court, quoting *Lucas:* "'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.'" 317 Or at 142, 854 P2d at 456; App., *infra,* I.100 . The Stevens Petition for Writ of Certiorari to this Court was denied, over

a dissent by Justices Scalia and O'Connor, 510 US 1207 (1994), App., *infra,* J.119.

4. Dismissal of Petitioners Federal Court Procedural Due Process Complaint (*Stevens II*)

The Stevens in their brief to the U.S. District Court, opposing dismissal, on grounds of claim preclusion, argued that the issue of procedural due process did not arise until *Lucas* was decided, long after the Stevens state takings complaint had been dismissed. Therefore, while the issue arose with *Lucas,* it did not ripen into a claim which could be joined in the state court case. R 17 at pp. 12-13, App., *infra,* D.28-30. The Stevens also argued that, even if claim preclusion fit the *Stevens II* case, it could not be applied because in § 1983 civil rights cases, the federal courts may ignore rules of claim preclusion and not grant full faith & credit to state courts decisions which fail to protect federal rights, by adhering to applicable federal standards. R 17 at pp. 18-19, App., *infra,* D.37-39.

The U.S. District Court, without discussing the above issues, granted the motion and dismissed petitioners due process complaint with prejudice. R 23, at p. 1, App., *infra,* B.3.

On appeal to the Court of Appeals for the Ninth Circuit, the Stevens reargued the points made before the District Court and also argued, during oral argument that the cause of action for denial of procedural due process in *Stevens II* did not arise out of the same transaction as gave rise to the taking case in *Stevens I,* nor did it ripen into a cause of action enforcible in the State case; both of which elements were necessary for claim preclusion to apply, App. Rec. 10 at pp. 26-27, App. *infra,* E.58-60. App., *infra,* G.72, 76-78, 91-92.

The Court of Appeals, on January 17, 1997, issued its unpublished Opinion and Order, affirming the dismissal of the Stevens procedural due process complaint. Thus, the District Court and the Court of Appeals accepted the *Stevens*

I Court's holding that *Thornton* merely enunciated a prior background principle of the States property law with no record before them in either *Thornton* or *Stevens I,* of any factual antecedent inquiry into the actual existence of customary public use easements in the State's law of nuisance and property when the Stevens took title, twelve years prior to the *Thornton* decision.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Case Below Conflicts with *Lucas v. South Carolina Coastal Council* and Makes *Lucas* Meaningless in Oregon

The Ninth Circuit Court of Appeals Order adopting the District Court's Opinion, App., *infra,* A.1, perpetuates the trial court's direct conflict with the *Lucas* decision which mandates some evidentiary record establishing that what appears to be a "categorical taking," requiring just compensation, was, in fact, a proscription inhering in the

state's common law of nuisance and property when the property owner took title. The result of this case is that all of Oregon's dry-sand beach owners —— already barred, by Oregon's courts, by *Stevens I,* from claims for the taking of their property without Just Compensation, —— are now barred from all relief from the Oregon Court's denial of procedural due process; thereby rendering *Lucas v. South Carolina Coastal Council,* 505 US 1003 (1992) meaningless in Oregon. This unjust condition occurs, despite the fact that neither the *Thornton*[6] case, nor *Stevens I*[7] (Stevens state takings case) nor *Stevens II*[8] (*Stevens* federal procedural due process case) afforded the property owner the "logically

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[6] *State ex rel. Thornton v. Hay,* 254 Or 584, 462 P2d 671 (1969).

[7] *Stevens v. Cannon Beach,* 114 Or App 457, 835 P2d 940 (1992) App., *infra,* H.96-99, *affirmed* 317 Or 131, 854 P2d 449, (1993) App., *infra,* I.100-118, *cert. denied* 510 US 1207 (1994) App., *infra,* J.119-125.

[8] *Stevens v. Cannon Beach,* 893 F. Supp. 944 (D.Or. 1995) App., *infra,* C.5 *affirmed,* unpublished opinion (C. A. 9 1997) App., *infra,* A.1.

antecedent inquiry," mandated by *Lucas*.

II. This Case Together with *Stevens I* (Prior State Takings Case) and the *Thornton* Case Are Precedent to All Other State Courts on How to Avoid *Lucas* and Evade Paying Just Compensation

The direct result of this case is that any state court, by following the cases of *State ex rel. Thornton v. Hay, supra,* p. 6 and *Stevens I, supra,* p. 7, and *Stevens II, supra,* p. 5, may now issue an *ipse dixit* edict, converting private property to public use, based upon a modified American *regional* version of the English common law doctrine of ancient *local* custom, by simply stating, without a record in support thereof, that the resulting customary public easement is a background principle of property law of the State and not a newly proclaimed right; thereby evading the holding in *Lucas,* and overturning more than a century of this Court's takings and procedural due process jurisprudence.

DISCUSSION

I. The Dismissal of Petitioners Complaint Deprives all Oregon Dry-sand Beach Owners Of Their Fifth Amendment Takings Claims in Oregon's Courts and Procedural Due Process Relief in Oregon's Federal Court — Contrary to the *Lucas* Case

The Federal District Court's Rule 12(b)(6) dismissal of petitioner's denial of procedural due process complaint was erroneous for two distinct reasons.

1. DeNovo Review Required of State Courts' Decisions Applying the Federal Due Process Standard Mandated by *Lucas*

The first, and most significant constitutional error in the case below was the District Court's acceptance, without analysis, of the Oregon Supreme Court's conclusions in *Stevens I*:

> ". . . [W]e conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not 'newly legislated or decreed'; to the contrary, to use the words of the *Lucas* court, it 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property

> and nuisance already placed upon land ownership . . . .'
>
> ****
>
> *"Thornton* merely enunciated one of Oregon's background principles of *** the law of property . . . ." 317 Or at 142-43, 854 P2d at 456. App., *infra,* I.110-111.

Prior to these conclusions, this Court in *Lucas, supra* at p. 8, admonished South Carolina, and thereby, all states, that — in establishing that principles of nuisance and property law precluding uses of the property now intended, inhered in the owner's title upon acquisition — the State could not use *ipse dixit* conclusionary assertions or some common law maxims. Instead, the State is required "to identify, [on the record,] background principles of nuisance and property law that prohibit the uses now intended in the circumstances in which the property is presently found," *Lucas, supra* at p. 8, 505 US at 1031.

In spite of these directives, the District Court below gave full faith and credit to the bare conclusions by the

Oregon Supreme Court in *Stevens I* that *Thornton* did not make new law in the State, but that *Thornton* had merely enunciated a background principle of Oregon's property law. The District Court, in *Stevens II,* had the duty to verify the constitutional adequacy of those conclusions made by the *Stevens I* Court, as those conclusions were controlled by the federal standard imposed by *Lucas*.[9]

The District court made no such analysis. Of course, the absence of any evidentiary record in either *Thornton* or *Stevens I,* made such an analysis impossible, as there was no factual record to examine as a basis for the conclusory holdings of the *Stevens I* state court. Therefore, the lack of such a record in both *Stevens I* and *Thornton* mandated such

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[9] *Niemotko v. Maryland,* 340 US 268, 271 91951); *Demorest v. City Bank Farmers Trust Co.*, 321 US 36, 41-43 (1944). *Haring v. Prosise,* 462 US 306, 313-14 (1983). *Delaware v. Prouse,* 440 US 648, 653-54 (1979). *See also: Katz v. Childrens Hospital of Orange County,* 28 F3d 1520, 1529 n.9 (C. A. 9 1994).

a hearing on the issue in the District Court, to satisfy *Lucas.*

The lack of a record, testing the pre-existence of customary public recreational easements in Oregon's law, is especially critical in *Stevens I, Stevens II* and *Thornton,* as well as in all other similar custom based takings cases for two extremely important and related reasons. The first reason is that while — the English law of local custom is restricted to a small well defined locality and for the sole use of a defined group of local residents, but the new American version, as first enunciated in *Thornton,* has broadened the doctrine to varied and vast locations of like-class properties for the benefit of the public (citizens of the entire country and its visitors?). Thus, *Thornton's* American custom has become regional or statewide, over entire classes of property, unlike its English precedent of discrete local custom.[10] The second reason is that *Thornton's* region wide

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[10] *See:* Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings,* 96 Colum.L.Rev. 1375 (1996).

coverage was adopted to accomplish the Oregon Supreme Court's avowed purpose of avoiding tract-by-tract litigation, with its vexing and potentially expensive, takings claims. *Thornton's* avoidance of tract-by-tract litigation caused contemporary legal commentators to raise doubts, on procedural due process grounds, about the constitutional viability of *Thornton's* purpose, as it related to thousands of dry-sand beach owners not before the *Thornton* court.[11] *Thornton's* unconstitutional deprivation of procedural due process has now become a reality through the decision in *Stevens I,* asserting, without a citation to prior Oregon cases or to historical writings, that *Lucas* didn't apply because *Thornton's* muscular judicial activism did not create a "new rule as applied to plaintiff's land" but merely enunciated one

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[11] Delo: The English Doctrine of Custom in Oregon Property Law: *State ex rel Thornton v. Hay,* 4 Envtl.L.Rev. 383, 410 (1975);

Note: Public Access to Beaches 22 Stan.L.Rev. 564 (1970).

of Oregon's "background principles of . . . the law of property," 317 Or at 143, 854 P2d at 456; App., *infra,* I.111. The assertion is unsupported by anything other than *Thornton's* own *ipse dixit* conclusions. Neither the *Thornton* case nor the *Stevens I* case had a trial record concerning the pre-existence of principles of custom creating a recreational easement on the beaches of Oregon at the time the Stevens acquired their land. Without such as record, no appellate court can determine whether such a principle did, in fact, exist. Therefore, the decision does not pass constitutional muster. *Webbs Fabulous Pharmacies v. Beckwith,* 449 US 155, 164 (1980). At least that was the opinion of Justices Scalia and O'Connor in their dissent from this Court's denial of certiorari in *Stevens I,* 510 US 1207, 1212-1213 (1994). App., *infra,* J.119.

The practical effect of the District Court's assumption, that the procedural due process cause of action was raised and decided, or subsumed, in *Stevens I,* is that no

procedural due process claims, arising from a state court's dismissal on the pleadings of a categorical takings case, can ever be litigated in Oregon's federal courts. That is exactly the position the State took in oral argument before the United States Court of Appeals for the Ninth Circuit, App., *infra,* G.87-91. Such an interpretation of the jurisprudence of procedural due process is contrary to the *Lucas* case and *Logan v. Zimmerman Brush Co.,* 455 US 422, 433-34 (1982), accord *Norco Construction Inc. v. King County,* 801 F2d 1143, 1146 (9th Cir., 1986).

2. The Federal Procedural Due Process Claim Did Not Arise Out of The Same Factual Transaction As The Preceding *Stevens I* State Takings Case And The Federal Claim Did Not Exist, As a Cause of Action, During The Pendency Of The *Stevens I* Case.

The second error by the District Court involves the misapplication of two elements of claim preclusion, assuming *arguendo,* that claim preclusion could be applied.

Oregon's common law of claim preclusion provides that: A plaintiff who has prosecuted one action against a defendant to a final judgment is precluded from prosecuting another action against the same defendant where: 1) The claim in the second action is one which is based on the same factual transaction that was at issue in the first action, and 2) The claim seeks a remedy additional or alternative to the one sought earlier, and 3) The claim is of such a nature as could have been joined in the first action.[12] A "claim," as used in the rule of claim preclusion, is a cause of action presently enforcible by a court.[13]

The District Court failed to note that the *Stevens I* state court "takings" case and *Stevens II* federal court

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[12] *Drew v. EBI Companies*, 310 Or 134, 140, 795 P2d 531, 535 (1990) approved in *Van der Hay v. U.S. National Bank*, 313 Or 86 (1992), 829 P2d 695 (1992).

[13] *Dean v. Exotic Veneers, Inc.*, 271 Or 188, 192-94, 531 P2d 266, 269 (1975).

"procedural due process" were not based upon the same factual transaction. The takings claim in *Stevens I* was based upon the City's and the State's denials of a permit to construct a sea wall. On the other hand, *Stevens II* was based upon the Oregon Court's denial of any form of evidentiary record establishing the existence of the doctrine of custom as a background principle of Oregon's law of nuisance and property, as mandated by *Lucas.* The two transactions complained of were totally dissimilar.

The District Court also failed to recognize that the case before it did not satisfy the third element of claim preclusion, *i.e., that the additional or alternative remedy is of such a nature as could have been joined in the first action.* The District Court made the unstated assumption that the plaintiff's had a claim (cause of action) against the City and State for the Oregon courts denial of procedural due process which could have been joined in the *Stevens I* takings case. No such cause of action existed during the

pendency of *Stevens I;* for the simple reason that a state's denial of procedural due process by policy does not give rise to a cognizable cause of action unless, and until, post-deprivational remedies are not afforded. *Zinermon v. Burch,* 494 US 113, 125-128 (1990) and *Parratt v. Taylor,* 451 US 527, 540 (1981).

II. This Case, Read with *Stevens I* and the *Thornton* Case Allows Other State Courts To, Not Only Evade *Lucas,* But, Thereby, Also Avoid the Takings and Due Process Clauses of the U.S. Constitution.

In addition to the repeal of the U.S. Constitution's Due Process and Takings clauses for a large class of property owners in Oregon, this case, with its unquestioning acceptance of *Stevens I,* has a far greater national impact and significance. It opens the field to all state courts who wish to make an end-run around the *Lucas* case.

Thornton, Stevens I and now *Stevens II* send a clear message to all other states on how to easily and entirely evade *Lucas*. All that is now required is for any state court

to (1) declare, *ipse dixit*, that any public use easement desired over any classification of real property is based upon an ancient regional public use custom, (*ala Thornton*) and (2) declare that said "custom" is a background principle of that state's common law, inhering in the property to begin with and, therefore, the transformation of private property to public use is neither a taking, requiring just compensation, nor subject to the due process standard of *Lucas* (*ala Stevens I*). Nor can owners complain to federal courts of violation of procedural due process standards due to the lack of an antecedent inquiry guaranteed by *Lucas,* because, either the claim of procedural due process was subsumed or decided in the earlier takings case and is precluded from relitigation, (*ala Stevens II*).

The notion that the *Thornton, Stevens I* and *Stevens II* triad of cases may be enthusiastically followed by other state courts is not far-fetched. Several law review commentators have praised *Thornton's* brand of custom for its application

to classes of property immense in size and value, unlike prescriptive and public trust theories.[14]

Professor David J. Bederman, in his above-cited

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[14] *See:* Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence: The Impact of *Lucas v. South Carolina Coastal Council* on Wetlands and Coastal Barrier Beaches, 19 Har.Entvl.L.Rev. 1 at 30-31 and 34-35 (1995). *(Arguing that "custom" has "intriguing possibilities for public regulation without effecting a taking).*

See: Rose, The Comedy of the Commons: Custom, Commerce and Inherently Public Property. 53 U. Chi.L.Rev. 711, 746 and 780 (1986). *(Arguing that custom applies to vast categories of land unlike rules of prescriptive use or the public trust doctrine).*

See: Levine, *Environmental Interest Groups and Land Regulations: Avoiding the Clutches of Lucas v. South Caroline Coastal Council,* 48 U Miami L.Rev. 1179 at 1213 (1994). *(Arguing for courts expanding Lucas' lone exception by declaring customary easements inhere in the state's common law).*

See: Patterson: California Land Use Regulation, Post *Lucas:* The History and Evolution of Nuisance and Public Property Laws Portends Little Impact in California, 11 UCLA J.Envtl L & Pol'y 175 (1993). *(Arguing that a state's comprehensive land use statutes inhere in all land titles, therefore, any use contrary thereto may be barred without just compensation).*

Columbia Law Review article,[15] also analyzed the cases of *Thornton, Lucas and Stevens I*, as well as other custom cases of the United States. He describes *Steven I's* conclusions that *Thornton* only enunciated a background principle of law as a ". . . startling feat of characterization [by which] the Oregon Supreme Court obliterated a constitutional requirement (whether articulated in a takings or due process idiom) that notice must be given to property owners when the government purports to take significant — and valuable — interests in land.[16] Professor Bederman also concludes that *Thornton's* regionalized customary public easement presents a profound threat to takings and due process jurisprudence:

> The danger that this precept poses to property rights jurisprudence is immense. The power of the customary principle developed in Oregon and Hawaii

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[15] *See* note 10, *supra* p. 19; 96 Colum. L.Rev. at 1408-34 (1996).

[16] *Id.* at pp. 1443-44.

> lies in its application to entire classes of property, not just particularized parcels. Once a jurisdiction recognizes that any kind of right to private property can be acquired via custom, all landowners are on notice that the type of property they own may later become the subject of such a claim. . . . [M]any states have recognized such a doctrine, and have applied it to property other than dry sand beaches. Governments at every level are likely to find solace in a doctrine precisely because it affords a way to circumvent due process requirements and just compensation guarantees for entire categories of property.

At least three state courts have recognized *Thornton* type customary public recreational easements, thereby adopting *Thornton's* stunning creation of a potent judicial formula for converting large tracts of private land to public use.[17]

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[17] *See: City of Daytona Beach. v. Tona Rama,* 294 So.2d 73 (Fla. 1974); *Arrington v. Mattox,* 767 SW.2d 957, 959 (Tex.App. 1989); *Public Access Shoreline Hawaii v. Hawaii's County Planning Commission,* 900 P2d 1313 (Haw Ct. App. 1993) *affirmed* 903 P2d 1246 (1995) *cert. denied* 116 S.Ct. 1559 (1996).

CONCLUSION

The combination of *Thornton, Stevens I and Stevens II* effectively suspends the Takings and Due Process clauses of the U.S. Constitution for thousands of dry-sands owners in Oregon. They also presage a similar suspension of such rights for other property owners in other states whose courts adopt the effective and cheap judicial takings techniques displayed in these three cases.

Reversal and remand "would not only set right a procedural injustice, but would hasten the clarification of Oregon's substantive law that casts a shifting shadow upon federal constitutional rights the length of the State."[18]

Respectfully submitted,

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[18] *Stevens v. City of Cannon Beach,* 510 US 1207, 1214 (1994) App., *infra,* J.126 (Justice Scalia's & O'Connor's dissent to denial of *certiorari*).